No. 7967

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JUNG YEN LOY,
Appellant,

vs.

EDWARD W. CAHILL, as Commissioner of Immigration and Naturalization for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This appeal is from an order of the United States District Court for the Northern District of California denying a petition filed by appellant's father, Jung Goey Fook, for a writ of habeas corpus in appellant's behalf (T. 44).

FACTS OF THE CASE.

Appellant, who was born in China on October 28, 1924, applied for admission into the United States as an American citizen (8 U. S. C. A., Section 6) by virtue of the alleged American citizenship of his father, Jung Goey Fook. The claim that the father

is a citizen rests in turn upon the claim that the latter is the son of one Jung Foo Wan, a deceased native of the United States.

Appellant's application was denied by a board of special inquiry (Exhibit "A", pp. 30-32, 35), and on appeal by the Secretary of Labor (Id. pp. 52, 51), because the alleged American citizenship of his father was not satisfactorily established.

The adverse decision is based upon the testimony of appellant himself that his father is not the son of Jung Foo Wan, the American citizen.

Appellant testified that his father's father is "Jung Wing Hong", that the latter is "living in my home village" (T. 16) and that appellant saw him there the day before appellant left home (T. 17). The following then ensued:

> "Q. Have you ever heard of anyone named Jung Foo Wan?
>
> A. (after long hesitation) (applicant starts to cry). Jung Wing Hong is my real grandfather; this Jung Foo Wan is the one who is supposed to be because my father came to the United States as Jung Foo Wan's son. I am not supposed to mention it. I have never seen Jung Foo Wan nor his wife and I understand Jung Foo Wan is dead. My father bought the paper of one of Jung Foo Wan's sons and I was told not to mention that" (T. 17).

Appellant testified further that both he and his father visited his real grandfather, Jung Wing Hong, quite often, and that a few days before he left home he learned for the first time that his father came to

the United States as a son of Jung Foo Wan (T. 18). He testified further as follows:

> "Q. Before that, did you ever know that Jung Foo Wan was supposed to be your grandfather?
>
> A. No.
>
> Q. Did your mother tell you many times to say that Jung Foo Wan was your make-believe grandfather?
>
> A. I don't know how many times but it was several times between my father and my mother.
>
> Q. Did you have to repeat it after them when they told you what to say?
>
> A. No, but they told me to be careful and remember this" (T. 19).

Thereafter appellant related in detail what he had been told to say regarding his alleged relatives, and what on the other hand the truth was (T. 20, 21, 23, 25-27, 30-34), explaining, *inter alia,* that several of his father's alleged brothers who also came to the United States as sons of Jung Foo Wan are actually children of other residents of the village (T. 22). As stated by the Secretary of Labor in considering counsel's suggestion that appellant was "romancing":

> "It would be difficult to make an analysis of the applicant's testimony which would show as plainly as does the reading of the testimony itself that an attempt has been made to prepare the applicant to tell a story which is not in accord with the facts as the applicant knows them; that, perhaps because of the fact that the applicant is only nine years old, this attempt has not been successful; and that the statements which the applicant made in his testimony were not 'romancing' but the truth as he knows it" (T. 52).

ARGUMENT.

I. THE ADMINISTRATIVE DECISION IS FINAL AND CONCLUSIVE.

In

Quon Quon Poy v. Johnson, 273 U. S. 352, 358. 47 S. Ct. 346, 348, 71 L. Ed. 680, 683,

the settled rule applicable to these proceedings is stated as follows:

> "It is clear, however, in the light of the previous decisions of this Court, that when the petitioner, who had never resided in the United States, presented himself at its border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing; and that unless it appeared that the Departmental officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the writ of *habeas corpus* without proceeding further" (citing cases).

And in

Louie Lung Gooey v. Nagle, 49 F. (2d) 1016,

this Court said:

> "We can not too often repeat that in immigration cases of this character brought before us for review, the question is not whether we, with the same facts before us originally, might have found differently from the Board; rather is it a question of determining simply whether or

> not the hearing was conducted with due regard to those rights of the applicant that are embraced in the phrase 'due process of law'. *Tang Tung v. Edsell,* 223 U. S. 673. Even if we were firmly convinced that the Board's decision was wrong, if it were shown that they had not acted arbitrarily but had reached their conclusions after a fair consideration of all the facts presented we should have no recourse. 'The denial of a fair hearing cannot be established by proving that the decision was wrong.' Chin Yow v. United States, 208 U. S. 8."

In

> *Fung Yun Ham v. Nagle* (C. C. A. 9), 22 F. (2d) 600, 603,

the alleged father had been admitted as a native born American citizen on numerous occasions—originally upon the basis of his own testimony and that of two other witnesses. When the alleged son applied for admission the father testified that he had not seen either of the two witnesses mentioned prior to his original entry. This Court said:

> "The fact that the father, who resides in, and claims to be a citizen of, the United States, joins in the petition with the nonresident applicant, in no wise affects the latter's status, or enlarges his rights. And, even were petitioner's contention to be conceded, that the department cannot revise or ignore its former conclusion, made upon full hearing, without additional evidence, undoubtedly the instant testimony of Fung Chong should be held to constitute such new evidence."

In

Wong Lim v. Nagle, 30 F. (2d) 96, 97,

the record contained a statement of the applicant that his alleged father was not born in the United States but in China, and that he was later naturalized as an American citizen. This Court said:

> "If the appellant's testimony was true, it follows that either Toy Wong was not his father, or that Toy Wong was fraudulently admitted to the United States as American born. * * * We are unable to see that the appellant was denied a fair hearing, or that there was abuse of authority in rejecting his application, or absence of evidence to sustain the finding of the Board of Special Inquiry."

Here the person whose application for admission is involved, himself admits that the claim upon which his entry is sought is false and fraudulent. We fail to see how it can be seriously argued that the administrative decision excluding him is arbitrary or without support in the evidence.

In *Flynn ex rel. Lum Hand v. Tillinghast,* 62 F. (2d) 308, which appellant cites, the father's testimony "was not contradicted in any manner, and was supported by official documents of unquestioned validity". The only reason assigned for the adverse decision was untruthfulness of another witness (eighty-three years old and apparently irresponsible) upon incidental matters. Obviously that case is not in point. Likewise in *Young Len Gee v. Nagle,* 53 F. (2d) 448, the testimony supporting the claim was uncontradicted, and the adverse decision was based en-

tirely upon trivial discrepancies relating to collateral matters.

The implication in appellant's brief that his admissions merely reflect a statement made by his mother is erroneous. True, he first learned from his mother that his father came to the United States as a son of Jung Foo Wan (T. 17-18). But appellant always understood that *Jung Wing Hong* was his grandfather (T. 18). He frequently visited the latter's house, as did his father (T. 18). A few days before leaving home he learned for the first time from his mother that his father had gained entry into the United States by representing himself to be a son of Jung Foo Wan (T. 18). Both his father and his mother told him several times that Jung Foo Wan was his "make-believe grandfather" and that he should be careful to remember that (T. 19).

The case of *Lee Choy v. U. S.*, 49 F. (2d) 24, which appellant cites, involved judicial proceedings, and appellant concedes that judicial rules of evidence are not applicable to these administrative proceedings. Moreover, that case does not hold that even in judicial proceedings a wife is not among "those most likely to be well informed as to the facts" where the issue is as to her husband's pedigree. The contrary is the rule (Wigmore on Evidence, 2nd ed., Section 1489). The theory of the exception is "that the constant (though casual) mention in discussion of important family affairs, whether of the present or past generation, puts it in the power of members of the family circle to be fully acquainted with the original

personal knowledge and the consequent tradition on the subject, and that those members will therefore know, as well as anyone can be expected to know, the facts of the matter'' (Id. Section 1486). Clearly any boy would know who his grandfather is. This is especially true among Chinese because of their veneration of ancestors (*Yep Suey Ning et al. v. Berkshire* (C. C. A. 9), 73 F. (2d) 745, 747; *Flynn ex rel. Young Quong On v. Tillinghast,* 63 F. (2d) 729, 731).

The *Lee Choy* case (supra) does illustrate the self-evident proposition that the prior statements of Jung Goey Fook's alleged relatives were not necessarily entitled in this case to the conclusive weight which appellant argues should have been accorded to them by the administrative authorities. In that case this Court said:

> ''* * * These witnesses at the time of giving their testimony were shown to have been vitally interested in proving that they themselves and not the appellant were sons of Lau Moon and Ching Chee and hence are not shown to be qualified to make their declarations admissible under the necessity principle.''

Here the prior declarations of appellant's father and of the latter's alleged relatives were made when they themselves were vitally interested in proving that the parties were sons of Jung Foo Wan, the American citizen. Appellant's testimony flatly contradicts those claims. Upon the whole record the administrative officers decided that the relationship

of Jung Goey Fook to Jung Foo Wan, the American citizen, was not established to their satisfaction. To employ the language used by the Supreme Court on one occasion, they "so adjudged from their knowledge of the conditions obtaining * * *, so adjudged from contact with the petitioners and in estimate of their pretensions, and, necessarily, we should not view the spoken word, * * * separate from that contact and that estimate", but should "leave the administration of the law where the law intends it should be left; to the attention of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion" (*Tulsidas v. Insular Collector of Customs,* 262 U. S. 258, 265, 43 S. Ct. 586, 588, 67 L. Ed. 969, 974).

It was within their knowledge of the conditions obtaining and of the fabrications used to accomplish evasion that fraudulent schemes such as that described in appellant's testimony are not uncommon. As early as 1889 the Supreme Court noted that the enforcement of the Chinese Exclusion Acts was attended with great embarrassment because of the suspicious nature of the testimony offered "arising from the loose notions entertained by the witnesses of the obligation of an oath" (*The Chinese Exclusion Case,* 130 U. S. 581, 598, 9 S. Ct. 623, 627, 32 L. Ed. 1068, 1073; *Fong Yue Ting v. U. S.,* 149 U. S. 698, 729, 730, 13 S. Ct. 1016, 1028, 37 L. Ed. 905, 919; *Li Sing v. U. S.,* 180 U. S. 486, 494, 21 S. Ct. 449, 452, 453, 45 L. Ed. 634, 638). And government records disclose that American citizens of Chinese race consistently

claim off-spring in the proportion of twelve sons to one daughter, and a death rate among them of less than one per cent, whereas independent surveys in China show that the actual sex distribution is 1064 males to 1000 females, and that the death rate for infants alone ranges from 29.7 per cent among Pekinese to 55.5 per cent among Cantonese (Appendix to government's brief in *Wong Wing Sin v. Nagle,* C. C. A. 9th, No. 6496; see also *Ex parte Wong Tung Dung,* 20 Fed. (2d) 149; *Ex parte Jew You On,* 16 Fed. (2d) 153). While this is no proof that non-existent sons of Jung Foo Wan were claimed the officers could weigh the admissions of appellant in the light of their administrative knowledge and experience (*Tulsidas v. Insular Collector of Customs,* supra).

At pages 11 and 12 of his brief appellant argues that previous declarations of alleged members of the family conclusively establish as a matter of law that Jung Foo Wan had such a son as Jung Goey Fook. The cases cited by him do not support his contention. In each of those cases the testimony as to the existence of the relationship was wholly uncontradicted and was all one way. Those, therefore, were cases of arbitrary disregard of uncontradicted evidence.

It is contended that the previous administrative decisions conceding Jung Goey Fook's claimed citizenship are more persuasive than appellant's testimony to the contrary. This argument addresses itself solely to the weight of the evidence, and "where the issue rests upon conflicting testimony, the Court

is not at liberty to review an administrative finding, unless in some other particular the conduct of the officers was such as to render the hearing unfair" (*Kumaki Koga, et ux. v. Berkshire* (C. C. A. 9th), 75 Fed. (2d) 820, 822). Obviously the weight of their previous decisions "with all the other evidence in the case, was for the consideration of the officers to whom Congress had confided the matter for final decision" (*Tang Tun v. Edsel,* 223 U. S. 673, 681, 32 S. Ct. 359, 363, 56 L. Ed. 606, 610).

> "To completely ignore such a holding would no doubt justify a conclusion that the action was arbitrary and violative of due process, but when they have in fact considered the effect of their prior order and given it all the weight that they think it is entitled to, the court is confronted, not with the question of whether or not the original order is prima facie evidence to be overcome by other evidence for that purpose, but whether or not on the whole case there had been such arbitrary exercise of authority as to deny the applicant due process of law."
>
> *Wong Chow Gin v. Cahill,* C. C. A. 9th, No. 7865, decided November 12, 1935.

Appellant cites *Grant Bros. Construction Co. v. U. S.,* 232 U. S. 647, 34 S. Ct. 452, 58 L. Ed. 776, but there the question related to the admissibility in evidence, at a judicial trial, of the finding of a board of special inquiry that the persons imported were aliens. Here the previous decisions were in evidence and were considered by the department, which went so far as to concede that "only very strong affirmative

evidence that the applicant's alleged father's admission in 1909 was accomplished by fraud and that he was not in fact the son of the native Jung Foo Wan, as whose son he was admitted, would warrant the denial of his status as a citizen at this time" (Exhibit "A", p. 52). The department found that there was such strong affirmative evidence in appellant's positive and repeated testimony that his father is not Jung Foo Wan's son but is in fact the son of Jung Wing Hong.

Regarding the statement that Jung Goey Fook registered in the Selective Service draft "as an American citizen", we have been unable to find from the record whether he registered as a citizen or as an alien but only find evidence that he registered, and that, according to his statement, he never received a classification card (Exhibit "C", p. 25). In any event the weight to be accorded such a matter, like any other fact, is for the administrative tribunals.

Appellant also argues that Jung Goey Fook's alleged American citizenship would not necessarily be inconsistent with his relationship to Jung Wing Hong, as the latter might be an American citizen. There is neither evidence nor claim that Jung Wing Hong is a citizen. The burden of proof is not upon the government, but upon appellant (*Wong Foo Gwong v. Carr* (C. C. A. 9), 50 F. (2d) 300, 362). The previous administrative decisions are without probative force to show citizenship through Jung Wing Hong, since those decisions were founded entirely upon the asserted relationship to Jung Foo Wan. He "cannot

now be heard to change the theory of his case'' (*Tsugio Miyazono v. Carr* (C. C. A. 9), 53 F. (2d) 172, 174).

The case of *Flynn ex rel. Chin She Yin v. Tillinghast,* 56 F. (2d) 317, bears no similarity to the case at bar. When the alleged brother in that case gave testimony at the age of eleven years, the suggestion was made by the officers that one of his brothers might have been adopted, and he assented. As the Court pointed out, he then testified that he first saw this child as an infant in his mother's arms, and he was only four years older than the child, which certainly had been a member of the household practically all his life; hence his statement, which had always been explained as a mistake due to childish ignorance, was of no value as indicating that the infant had been adopted, since a boy of that age would probably not know the meaning of that term in any event.

Appellant also cites *Ex parte Cheung Tung,* 292 F. 997. In that case not only was there absolutely no proof that the person who made the adverse statement upon an earlier occasion was the alleged father's brother, but there was on the other hand much evidence that said person was an impostor; neither his appearance, his description nor his handwriting corresponded with that of the person he claimed to be. The error of the immigration authorities in that case was in unjustifiably assuming, though not finding, that he was in fact a member of the family and treating his statements as proof that the alleged father

had no such son as the applicant. Clearly that case has no application here, where the applicant himself directly testified as to the falsity of the claim.

In our opinion the suggestion is an entirely novel one that a decision of the tribunal to whom the issues of fact are committed for determination may be overthrown on habeas corpus, when the applicant himself has admitted the falsity of his claim. Appellant's testimony is a detailed disclosure of the manner in which this fraud was attempted to be perpetrated on the government. He describes his real grandparents and his real uncles. He tells how a number of impostors, including his father, passed themselves off as sons of Jung Foo Wan, the American-born Chinese, to obtain a fraudulent status as citizens of the United States. He discloses what on the one hand he was told to say, and what on the other is the truth. The obvious fact is that this child is less skilled than his alleged relatives in adhering to a concocted story, and with youthful ingenuousness and candor has blurted out the truth. In any event, it is obvious that the administrative decision, based upon this conflicting testimony is final and conclusive.

II. THERE WAS NO UNFAIRNESS IN THE PROCEEDINGS.

It is claimed that the immigration hearing was unfair in that appellant's father was not confronted with the testimony which appellant gave.

At the first hearing appellant's father was asked whether the testimony given was or was not true,

namely: that Jung Wing Hong was his father; that his real brothers were Jung Ngit and Jung Goey Seuk; that he and several others secured admission as the sons of Jung Foo Wan when they were not actually his sons; and whether he or his wife had instructed the applicant as to what he should say and what he should not say (T. 41-43). In short, he was questioned specifically as to the truth of everything appellant had stated. He denied all of it. Immediately thereafter the attorney of record was specifically informed that the board of special inquiry had questioned the citizenship of appellant's father and had deferred final decision to permit the latter to present any additional evidence he might desire bearing upon his claimed status (Exhibit "A", p. 33). The attorney replied that no additional evidence on that issue was available (Id. p. 34). On August 7, 1934 the attorney received a copy of all the testimony (Id. p. 38), and on August 9, 1934 reviewed the entire record, including all exhibits (Id. p. 39).

In

Soo Hoo Hung, et al. v. Nagle (C. C. A. 9), 3 F. (2d) 267, 268,

the Court said:

> "Appellants say that the files in the case of Soo Hoo Jin, an alleged son of Soo Hoo Hing, who was deported, though considered in the decision of the applications under consideration, were never brought to the attention of the applicants. The record refutes the contention by showing that the entire record was given to the attorney for these applicants, and that he later returned

> certain exhibits, which included the files and the exhibit, which it is now said were not brought to the attention of the applicants."

Exactly the same procedure was followed in the case at bar. Neither at the time of reviewing the complete record, nor after receiving a complete copy of it, nor when subsequently presenting the matter on appeal before the Department, was any suggestion made by appellant's attorneys of any desire to offer anything further to refute appellant's testimony. The matter was briefed before the department on appeal (Exhibit "A", pp. 49-45) without any reference whatever to the point now raised. We submit not only that the charge of unfairness is without merit but that any possible ground for complaint has been waived (*Kamiyama v. Carr* (C. C. A. 9), 44 F. (2d) 503, 505, 506; *Li Bing Sun v. Nagle* (C. C. A. 9), 56 F. (2d) 1000, 1002, 1003).

In *Kwock Jan Fat v. White,* 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010, which appellant cites, favorable evidence was suppressed. In the other two cases cited at page 18 of appellant's brief evidence was considered without appellant's knowledge and without opportunity to meet it. In *Mahler v. Ebey,* 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549, the omission was *in the final decision itself,* which necessitated remanding the case to correct the finding. Clearly none of those cases is in point.

CONCLUSION.

We submit that the decision of the immigration authorities is final and conclusive, that there was nothing arbitrary or unfair either in their procedure or in their finding, and that the order of the Court below denying the petition for writ of habeas corpus was correct and should be affirmed.

Dated, San Francisco,
January 13, 1936.

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